

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY
COURTHOUSE
GEORGETOWN, DE 19947

January 26, 2007

Recardo B. Weatherspoon
SCI
P.O. Box 500
Georgetown, DE 19947

RE: State v. Weatherspoon, Def. ID# 0001003156 R-2

DATE SUBMITTED: December 6, 2006

Dear Mr. Weatherspoon:

Pending before the Court is the second motion for postconviction relief which defendant Recardo B. Weatherspoon ("defendant") has filed pursuant to Superior Court Criminal Rule 61("Rule 61"). This is my decision denying that motion.

In January 2000, defendant was arrested on numerous drug and drug-related charges. On June 14, 2000, he entered into a plea of guilty to charges of delivery of cocaine and two counts of conspiracy in the second degree.

As a part of the plea agreement, defendant agreed to be sentenced as a habitual offender. The State presented a motion to declare him to be a habitual offender under 11 Del. C. § 4214(a).¹ The motion included certified copies of four prior felony convictions. The

¹The version of 11 Del. C. § 4214(a) in effect at the time of defendant's sentencing provided as follows:

documentation evidenced convictions and sentencings on the dates indicated below:

Burglary in the Third Degree - conviction on June 14, 1988 and sentencing on October 26, 1988

Receiving Stolen Property - conviction and sentencing on January 24, 1992

Attempted Robbery in the Second Degree - conviction and sentencing on March 24, 1993

Burglary in the Second Degree - conviction and sentencing on January 6, 1995

During the plea colloquy, the following exchange took place:

THE COURT: The penalties here are severe. Number one, there is a motion that's been filed by the State to have you declared to be a habitual offender. You have discussed this with Mr. Haller, is that right?

THE DEFENDANT: Not about habitual offender.

THE COURT: All right. A habitual offender is a status that occurs to people that have a certain number of convictions on their record. The law is that people

a) Any person who has been 3 times convicted of a felony, other than those which are specifically mentioned in subsection (b) of this section, under the laws of this State, and/or any other state, United States or any territory of the United States, and who shall thereafter be convicted of a subsequent felony of this State is declared to be an habitual criminal, and the court in which such 4th or subsequent conviction is had, in imposing sentence, may in its discretion, impose a sentence of up to life imprisonment upon the person so convicted. Notwithstanding any provision of this title to the contrary, any person sentenced pursuant to this subsection shall receive a minimum sentence which shall not be less than the statutory maximum penalty provided elsewhere in this title for the 4th or subsequent felony which forms the basis of the State's petition to have the person declared to be an habitual criminal except that this minimum provision shall apply only when the 4th or subsequent felony is a Title 11 violent felony, as defined in § 4201(c) of this title. Notwithstanding any provision of this title to the contrary, any sentence so imposed pursuant to this subsection shall not be subject to suspension by the court, and shall be served in its entirety at a full custodial Level V institutional setting without benefit of probation or parole, except that any such sentence shall be subject to the provisions of §§ 4205(h), 4217, 4381 and 4382 of this title.

that have a certain number of convictions on their record, when they are convicted of another offense, then face heavier penalties than those people who were not having such a bad record.

In your case, you have a motion to declare you to be a habitual offender, the offense of delivery of cocaine which you're proposing to plead guilty. They claim you have convictions for burglary in the third degree in 1988; receiving stolen property in 1992; attempted robbery second degree, 1993; burglary second degree, 1995; delivery of cocaine, December 16, 1999.

Under the law, these would be at least three violent offenses and separate occasions which make you eligible for declaring you as being a habitual offender, which means that on a sentence here today on delivery of cocaine, you will be exposed to life imprisonment by being declared to be a habitual offender. The Court is required to give you a sentence of ten years for delivery of cocaine. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you acknowledge that, in fact, you have these prior convictions?

THE DEFENDANT: Yes.

MR. GELOF: Your Honor, something was just brought to my attention. Because of the habitual offender status, he would not be able -- the Court is not able to put him on probation on the delivery. So what I would suggest -- and this would be giving Mr. Weatherspoon a benefit.

MR. GELOF: So what the State would suggest would be -- it's going to shave a year off the time, because that will fulfill the parties' understanding. Because he would have been eligible for good time on the two years on each of the conspiracies, the State would suggest that the Court give him a flat 13 years.

THE COURT: I tell you what I'm going to do. I'm going to do some other business. I want you and Mr. Haller to rework the Plea Agreement then, and we'll revisit the subject. ...

MR. GELOF: You Honor, I believe we're available to revisit Mr.

Weatherspoon. Your Honor, what the State has done is actually a windfall for Mr. Weatherspoon. The State would ask that the Court impose 13 years on the delivery of cocaine because that would all be mandatory time. And under the previous agreement, he would have been eligible for 180 days good time credit.

The State has shaved a year off. What the State is asking to accomplish is 13 years at Level 5 on the delivery of cocaine. On each of the conspiracies, two years Level 5, suspended for two years Level 3. So he just benefitted from four years Level 3 probation and probably about six months in jail.

Transcript of June 14, 2000, Proceedings at 11-16.

The Court explained the consequences of the plea and asked defendant if he understood everything. He responded that he did. The Court then asked if he still wished to proceed with the guilty plea and he replied that he did. Additionally, the Court asked defendant if he had been over the habitual offender application with his attorney. Defendant confirmed he had and affirmatively stated that he had earlier acknowledged the prior felonies.

In addition to the above-referenced review of the habitual offender matter with defendant and his admissions regarding his convictions, defendant acknowledged that he was a habitual offender in the plea agreement dated June 14, 2000. Finally, the immediate sentencing form dated June 9, 2000 listed all of defendant's prior felonies. The information in these documents was explained to him and he signed them.

Defendant was declared a habitual offender. He was sentenced on June 14, 2000, as follows. As to the delivery conviction, he was sentenced to thirteen years mandatory time. As to the conspiracy convictions, he was sentenced to periods of Level 5, suspended for periods of probation at Level 3. Defendant's judgment of conviction was final for Rule 61 purposes on July 14, 2000. Rule 61(i)(m)(1).²

²In Rule 61(m)(1), it is provided as follows:

This Court ruled in a letter dated June 27, 2000, that defendant knowingly, willingly and voluntarily entered into this plea after expressing satisfaction with his attorney's representation.

State v. Weatherspoon, Def. ID # 0001003156, Stokes, J. (June 27, 2000).

On August 13, 2002, defendant filed his first Rule 61 motion. This Court denied the motion. State v. Weatherspoon, Del. Super., Def. ID# 0001003156, Stokes, J. (Oct. 1, 2002). The Supreme Court affirmed that judgment. Weatherspoon v. State, Del. Supr., No. 591, 2002, Walsh, J. (Feb. 28, 2003).

On May 15, 2006, defendant filed a motion for correction of illegal sentence. In that motion, he argued his sentence was illegal because his status as a habitual offender was not properly established. He advanced the same arguments he has advanced in the pending Rule 61 motion. This Court denied the motion. State v. Weatherspoon, Del. Super., Def. ID# 0001003156, Stokes, J. (May 31, 2006). The Supreme Court affirmed the denial of that motion; however, the affirmance appears to be on grounds different from those on which the Superior Court based its denial. Weatherspoon v. State, Del. Supr., No. 336, 2006, Steele, J. (October 17, 2006). Pertinent statements in that decision are set forth below:

(3) After careful consideration of the parties' respective positions on appeal, we find it manifest that judgment of the Superior Court must be affirmed. It is well-settled that the limited purpose of a motion under Rule 35(a) is to permit correction of an illegal sentence. [Footnote and citation omitted.] It is not a means for a defendant to attack the legality of his convictions or to raise allegations of error occurring in the proceedings leading to the judgment of conviction. [Footnote and citation omitted.] Weatherspoon pled guilty as an habitual offender. To the extent he could have challenged his status, that contention should have

Definition. A judgment of conviction is final for the purpose of this rule as follows:

(1) If the defendant does not file a direct appeal, 30 days after the Superior Court imposes sentence....

been raised prior to the entry of his guilty plea. Accordingly, we find no error in the Superior Court's denial of Weatherspoon's motion for correction of sentence because the issue raised therein was not the proper subject of a motion under Rule 35(a).

Id. at 2-3.

Defendant apparently read this language to say that he should file a motion for postconviction relief asserting these grounds. He filed such a motion on December 4, 2006. In his Rule 61 motion, defendant argues that his habitual offender status was not established in accordance with law.³ He argues that what has to be established, which was not established, is that the date of one offense resulting in a conviction must occur after the date of the sentencing on the prior conviction in order to provide a defendant with some chance at rehabilitation. He also argues the colloquy was not sufficient.

There are numerous procedural bars which preclude consideration of defendant's claim. Rule 61(i).⁴

³Defendant cites to the case of Evans v. State, Del. Supr., No. 67, 2004 (Nov. 23, 2004) (*per curiam*). This case does not support defendant's argument in any way.

⁴In the version of Rule 61(i) applicable to defendant's case, it is provided as follows:

Bars to relief. (1) Time limitation. A motion for postconviction relief may not be filed more than three years after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than three years after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

(2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.

(3) Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows

(A) Cause for relief from the procedural default and

First, defendant's motion is time-barred. His time for filing a motion for postconviction relief ended on July 14, 2003. Defendant argues that his claim is based on "a retroactively applicable right that is newly recognized after the judgment of conviction is final". Rule 61(i)(1). He then invokes two cases as establishing the newly recognized rule of law. The first is the 2004 case of Shockley v. State, Del. Supr., No. 600, 2003, Berger, J. (Aug. 2, 2004). The other case he names is Hall v. State, *supra*. He gives no citation for the Hall case. However, the case to which he is referring is Hall v. State, 473 A.2d 352, 357 (Del. 1984), which, of course, is a 1984 decision.

In Shockley v. State, *supra*, at 10, the Supreme Court stated:

Shockley claims that he did not qualify for sentencing as a habitual offender because he was not incarcerated for each of the predicate felonies. Shockley's claim is without merit. The State is not required to prove incarceration when establishing predicate offenses under the habitual statute. Fn. 16. The State need only establish three separate convictions, each successive to each other, with some chance of rehabilitation after each sentencing. Fn. 17.

Fn. 16. Lis v. State, 327 A.2d 746 (Del. 1974).

Fn. 17. Del. Code Ann. Tit. 11, § 4214(a); Buckingham v. State, 482 A.2d 327, 330 (1984).

The Shockley case references Buckingham v. State, 482 A.2d 327, 330 (1984). Therein,

(B) Prejudice from violation of the movant's rights.

(4) Former adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.

(5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.

the Supreme Court followed its decision in Hall v. State, 473 A.2d, and repeated the rule of law that in order to impose the habitual offender statute, “three separate convictions are required, each successive to the other, with some chance of rehabilitation after each sentencing, before the extreme penalty of life imprisonment may be brought to bear.” Buckingham v. State, 482 A.2d at 330-31. The rule of law announced in Hall v. State, 473 A.2d at 356-7, was that the second offense (on which there was a conviction and sentencing) must occur after the sentencing on the first offense; the third offense must have taken place after the sentencing on the second offense; and so on. Thus, since 1984, the law has been that “some chance of rehabilitation” means only that some period of time must have elapsed between sentencing on each predicate conviction and the commission of the offense resulting in the later felony conviction. Consequently, defendant’s claim is not newly recognized. Since defendant does not establish any exceptions to the bar, the claim is time-barred.

Defendant’s claim also is barred because it should have been raised during the proceedings leading to the judgment of conviction. Rule 61(i)(3). To the extent he argues the cause for relief was ineffective assistance of counsel, the claim is barred because he should have raised it during his first postconviction relief motion. Rule 61(i)(2). Defendant has not shown any exceptions to the bars exist. In particular, defendant has not argued prejudice nor has he shown any prejudice. Defendant has not argued or shown that any of the offenses which qualified him for habitual offender status took place before a sentencing on a previous conviction. I note as an aside that he cannot make such a showing; a review of his criminal history shows that each subsequent conviction was based on an offense which took place after the previous conviction

and sentencing.⁵

Even if the Court ignored the procedural bars, defendant's claim would fail on its merits.

Defendant agreed he was a habitual offender, and such an agreement constitutes a valid means for establishing habitual offender status. Videtto v. State, 829 A.2d 936 (Del. 2003).

Defendant is bound by his statements that he qualified as a habitual offender. Marshall v. State, Del. Supr., No. 339, 1998, Walsh, J. (Nov. 20, 1998) In agreeing he had the requisite number of felony convictions and that he was qualified for sentencing as a habitual offender and in making the habitual offender designation as a part of the plea, defendant has waived any right to raise procedural issues in the establishment of the habitual offender status and issues regarding the qualifications of his past convictions. Loncki v. State, Del. Supr., No. 320, 2006, Berger, J. (Jan. 9, 2007); Parisi v. State, 823 A.2d 491 (Del. 2003); Marshall v. State, supra; State v. Morris, Del. Super., Def. ID# 9712015246, Gebelein, J. (May 17, 1999).

For the foregoing reasons, I deny defendant's motion for postconviction relief.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
Adam Gelof, Esquire
Public Defender's Office

⁵Defendant was convicted on the burglary in the third degree charge on June 14, 1988. The receiving stolen property offense took place on August 25, 1991, and he was sentenced on such charge on January 24, 1992. The attempted robbery offense occurred on December 16, 1992, and he was sentenced thereon on March 24, 1993. He committed the burglary in the second degree crime on August 14, 1994, and was convicted thereon on January 6, 1995.